

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3034 of 2017**

**In
CRIMINAL APPEAL (DB) No.792 of 2017**

Arising Out of PS. Case No.-248 Year-2012 Thana- HUSSAINGANJ District- Siwan

=====
Md. Danish, son of Late Md. Sibagtullah, resident of Village Harihansh, P.S.
Hussainganj, District Siwan

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====
with

GOVT. APPEAL (DB) No. 15 of 2017

Arising Out of PS. Case No.-248 Year-2012 Thana- HUSSAINGANJ District- Siwan

=====
The State of Bihar

... .. Appellant/s

Versus

1. Manish Kumar, Son of Umesh Singh, Resident of Village- Harihans Dakshin Tola, P.S.- Hussainganj, District- Siwan.
2. Aarif Irshad, son of Irshad Ahmed, Resident of Village- Harihans Bisati Mohalla, P.S.- Hussainganj, District- Siwan.
3. Ghulam Shahid, Son of Nuruddin Ahmed, Resident of Village- Harihans Bisati Mohalla, P.S.- Hussainganj, District- Siwan.
4. Mohammad Danish, Son of Sibghatullah, Resident of Village- Harihans Bisati Mohalla, P.S.- Hussainganj, District- Siwan.

... .. Respondent/s

=====
with

CRIMINAL APPEAL (DB) No. 722 of 2017

Arising Out of PS. Case No.-248 Year-2012 Thana- HUSSAINGANJ District- Siwan

=====
Tuba Tabassum, D/o Md. Aarif Ashraf, Resident of Village- Harihans Bisati
Mohalla, P.S.- Hussainganj, District- Siwan.

... .. Appellant/s

Versus

1. The State of Bihar
2. Manish Kumar, Son of Umesh Singh, Resident of Village- Harihans Dakshin Tola, P.S.- Hussainganj, District- Siwan.



3. Aarif Irshad, Son of Irshad Ahmad, Resident of Village- Harihans Bisari Mohalla, P.S.- Hussainganj, District- Siwan.
4. Gulam Shahid, Son of Nuruddin Ahmed, Resident of Village- Harihans Bisari Mohalla, P.S.- Hussainganj, District- Siwan.
5. Mohammed Danish, Son of Sibghatullah, Resident of Village- Harihans Bisari Mohalla, P.S.- Hussainganj, District- Siwan.

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 1803 of 2017

Arising Out of PS. Case No.-248 Year-2012 Thana- HUSSAINGANJ District- Siwan

1. Manish Kumar, S/o Umesh Singh, R/o village- Harihash Dakhin Tola, P.S.- Hussainganj, District- Siwan.
2. Gaulam Shahid, S/o Nuruddin Ahamd, R/o village- Harihash Bashati, P.S.- Hussainganj, District- Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 2130 of 2017

Arising Out of PS. Case No.-248 Year-2012 Thana- HUSSAINGANJ District- Siwan

Arif Irshad, son of Md. Irshad @ Irshad Ahmad, Resident of Village- Harihans, P.S.- Hussainganj, District- Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 3034 of 2017)

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Advocate
Mr. Anuj Kumar, Advocate
Ms. Priyanka Singh, Advocate
For the Respondent/s : Mr. Anita Kumari Singh, APP
For the Informant : Mr. Prashant Kumar, Advocate
Mr. Netan Chouhan, Advocate
Mr. Mayank Mohan, Advocate

(In GOVT. APPEAL (DB) No. 15 of 2017)

For the Appellant/s : Mr. Dilip Kumar Sinha, Advocate



For the Respondent/s : Mr. Rakesh Kumar Shrivastava, Advocate
(In CRIMINAL APPEAL (DB) No. 722 of 2017)

For the Appellant/s : Mr. Prashant Kumar, Advocate
Mr. Netan Chouhan, Advocate
Mr. Mayank Mohan, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP
(In CRIMINAL APPEAL (SJ) No. 1803 of 2017)

For the Appellant/s : Mr. Gajendra Kumar Singh, Advocate

For the Respondent/s : Mr. Zeyaul Hoda, APP

For the Informant : Mr. Prashant Kumar, Advocate
Mr. Netan Chouhan, Advocate
Mr. Mayank Mohan, Advocate

(In CRIMINAL APPEAL (SJ) No. 2130 of 2017)

For the Appellant/s : Mr. Ramadhar Shekhar, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

For the Informant : Mr. Prashant Kumar, Advocate
Mr. Netan Chouhan, Advocate
Mr. Mayank Mohan, Advocate

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

Date : 22-11-2024

Against the judgment of conviction and order
of sentence dated 01.05.2017 and 09.05.2017
respectively, passed by the learned Additional District &
Sessions Judge-II, Siwan in Sessions Trial No. 41 of
2013 (G.R. No. 3536 of 2012), arising out of
Hussainganj P.S. Case No. 248 of 2012, whereby four
accused persons were convicted and sentenced to
undergo RI for ten years, to pay a fine of Rs. 25,000/-



each for the offence under Section 307 read with Section 120-B of the IPC and RI for ten years, to pay a fine of Rs. 25,000/- each for the offence under Section 326/34 of the IPC, five appeals were filed before this Court; three being appeals preferred by four of the accused/convicts and the other two being Government Appeal seeking enhancement of sentence under Section 307 of the IPC and an appeal by the victim for adequate compensation under Section 372 of the Code of Criminal Procedure.

2. The prayer for suspension of sentence of the convicts were rejected by different Benches. Those appeals were listed before the Single Judge as the maximum sentence was of ten years.

3. Since the Government Appeal under Section 377 of the Cr.P.C. and the appeal by the victim under Section 372 of the Cr.P.C. were listed before the Division Benches, some of the SJ appeals were directed to be listed before the Division Bench where the



Government Appeal and the appeal under Section 372 of the Cr.P.C. were listed.

4. It was in this context that a Division Bench of this Court *vide* order dated 05.10.2020 in Criminal Appeal (DB) No. 792 of 2017 observed that the very referral of the Cr. Appeals (SJ) to Division Bench was neither warranted nor in accordance with the rules of Patna High Court.

5. The following questions were formulated by the aforementioned Division Bench for a decision by a larger Bench;

(i) Whether a Division Bench can entertain an appeal preferred by a convict in which a substantive sentence passed is for ten years?

(ii) Whether the Rules prescribed for creation of jurisdiction in the Division Bench in the matters to be exclusively heard and disposed of by a Single Judge?

(iii) Whether the coram for adjudication of



an appeal against conviction prescribed under the Rules can be changed by an order passed by the Court?

6. Though the issues raised may not be of any seminal importance, nonetheless they need to be answered.

7. So far as criminal appeals are concerned, Rule 2 of Chapter II of the Patna High Court Rules provides that:

(a) an appeal or reference in a case in which a sentence of death has been passed;

(b) an appeal, revision or reference in which a substantive sentence of more than ten years imprisonment has been passed;

(c) an appeal under Section 378 from an order of acquittal relating to an offence punishable with death or with imprisonment for life or with imprisonment of either description for more than ten years and passed by a Court competent to pass such sentence;



(d) an appeal under Section 377 or a case in which notice has been issued under Section 401 to an accused to show cause while the sentence should not be enhanced, shall be listed before the Division Bench of the High Court.

8. Rule 1 of Chapter II of the Patna High Court Rules provides that an appeal, application or reference under the Code of Criminal Procedure other than mentioned in Rule 2 (referred to above) shall be heard and disposed off by a Single Judge.

9. Thus, all appeals carrying sentence of more than ten years are to be placed before the Division Bench and sentence up to ten years are to be heard and disposed off by a Single Judge.

10. In these set of appeals, one of the members of the referring Division Bench had heard the appeal of one Md. Danish sitting singly on the issue of suspension of sentence and had rejected that prayer with an observation that the appellant/applicant could



renew his prayer for bail if his appeal is not taken up for final hearing within nine months from the date of passing of such order.

11. When some of the other appeals were listed before the another Single Judge and it was informed that the Government Appeal under Section 377 of the Cr.P.C. and appeal by the victim for payment of adequate compensation to her under Section 372 of the Cr.P.C. were pending consideration before the Division Benches, the Single Judge appeals were also directed to be listed before the Division Benches where the aforementioned two Division Bench appeals were pending.

12. The referral order appears to be based on the decision of the Supreme Court in ***Pandurang & Ors. vs. State of Maharashtra; AIR 1987 SC 535*** where it was held that "*when a matter, required to be decided by a Division Bench of the High Court, is decided by a learned Single Judge, the judgment would*



be a nullity, the matter having been heard by a Court which had no competence to hear the matter, it being a matter of total lack of jurisdiction".

13. The Supreme Court, in the instant case, had held that even a right decision by a wrong coram would be no decision as it would be *coram non judice*.

14. The other decision relied upon by the referral Bench was in ***Kanwar Singh Saini vs. High Court of Delhi; (2012) 4 SCC 307***, wherein it was held that "*there can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decrece having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the root of the cause. Such an issue could be raised at any belated stage of the proceedings including in appeal or execution. The finding of a Court or Tribunal becomes irrelevant and*



unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative intendment. The court cannot derive jurisdiction apart from the statute".

15. While referring the matter to a larger Bench, the Division Bench had held that in view of the statutory rules and the judgments of the Supreme Court (referred to above), *prima facie*, the Bench voiced the opinion that the learned Single Judge could not have created jurisdiction for entertaining the appeal by a Division Bench by passing a judicial order when the appeal was required to be heard and disposed off by a Single Judge under the rules.

16. It was also observed that if the matter would have been referred by the learned Single Judge to the Division Bench, there would have been no difficulty for the Division Bench in remanding the matter before the Single Bench, but in this instance, a Division Bench



had directed for listing of all the appeals together along with Government Appeal (DB) No. 15 of 2017 and the Criminal Appeal (DB) No. 722 of 2017 under Section 372 of the Cr.P.C. The correctness of this was doubted by the referring Division Bench.

17. In our considered view, reliance on the aforementioned two Supreme Court judgments for referring the matter to a larger Bench was, in the first instance, not required as the aforementioned two judgments of the Supreme Court dealt with different fact situations.

18. Listing of all the appeals arising out of a common judgment has been the customary practice of the Patna High Court. This is for the purposes of avoiding contradictory orders and judgments. The classification of Benches and allocation of appeals to be heard by those Benches is purely administrative in nature.

19. A Division Bench which hears the appeals where offences are punishable with death,



imprisonment for life or a sentence of more than ten years, can very well hear an appeal where the actual punishment awarded is less than ten years.

20. Thus, such listing of appeals before the Division Bench even when the sentence is only up to ten years, would not amount to creation of jurisdiction.

21. Had it been a case where a matter was required to be decided by a Division Bench of the High Court but it was decided by a Single Judge, that judgment but would be a nullity, the matter having been heard by a Court which had no competence to hear the matter. This would have been a matter of total lack of jurisdiction. Even a right decision by a wrong forum is no decision. It is non-existent in the eyes of law and hence, a nullity.

22. This proposition is not applicable to cases which though were to be heard by a Single Judge, but was transferred to a Division Bench.

23. After all, it is an appeal to the High



Court.

24. Another aspect of the matter which needs to be highlighted is that there is no ouster of the jurisdiction of a Division Bench in hearing of an appeal carrying a sentence up to ten years also.

25. Rule 1 of Chapter II of the Patna High Court Rules simply provides a list of matters which may be heard and disposed off by a Single Judge.

26. A procedure with respect to constitution of Benches is something designed to facilitate and provide ease of administration of justice. Such a distributive pattern cannot be likened to any penal enactment for punishments and penalties. Any technical construction of the Rules of the Patna High Court of this kind would leave no room for reasonable elasticity of interpretation, lest the very means designed for the furtherance of justice would stand frustrated.

27. It would also be necessary for us to refer in brief as to the circumstances under which



Pandurang and **Kanwar Singh Saini** (supra) were decided by the Supreme Court.

28. In **Pandurang** (supra), the appellants were acquitted by the Trial Court for an offence under Section 7(1) read with Sections 16 and 17 of the Prevention of Food Adulteration Act, 1954. The State of Maharashtra had preferred an appeal before the High Court of Bombay against the aforementioned judgment of acquittal which was heard by a Single Judge. The appeal was required to be heard by a Division Bench of the High Court and not by a learned Single Judge in accordance with Bombay High Court Appellate Side Rules, 1960, which provided that any offence punishable with sentence of imprisonment exceeding two years is to be heard by a Division Bench of the High Court.

29. The learned single Judge had set aside the order of acquittal and had held the accused to be guilty.



30. It was in this context that the Supreme Court observed that if a matter which is to be decided by a Division Bench of the High Court and that is decided by a Single Judge, the judgment would be a nullity.

31. Thakkar, J. had very pithy observed that 'right' or 'wrong', 'guilty' or 'not guilty', is not the question. The question is whether the learned Single Judge had the '*right*' to hear and decide the appeal and hold the appellants guilty whilst setting aside their acquittal by the judgment under appeal.

32. The Supreme Court went on to observe that an accused is entitled to be heard by at least two learned Judges constituting a Division Bench and had a right to claim a verdict as regards his guilt or innocence at the hands of two learned Judges. This right cannot be taken away except by amending the rules. So long as the rules are in operation, it would be arbitrary and discriminatory to deny the accused his right, regardless



of whether it is done by reason of negligence or otherwise. Deliberately, it cannot be done. Negligence can neither be invoked as an *alibi*, nor can cure the infirmity or illegality, so as to rob the accused of his rights under the rules. What can be done only by at least two learned Judges cannot be done by one learned Judge. Even if the decision is right on merits, it is by a forum which is lacking in competence with regard to the subject-matter.

33. The converse need not always be true.

34. An appeal which normally is to be decided by a Single Judge can also be decided by a Division Bench comprising two Judges.

35. This would not be any usurpation of or creation of any jurisdiction.

36. In **Kanwar Singh Saini** (supra) (hereinafter referred to as 'Saini'), Saini had executed a sale deed in favour of one M in respect of suit premises for a specified sum. M had filed a suit for permanent



injunction alleging that Saini had no right to dispossess him from the said suit premises. An undertaking was given by Saini that he shall not dispossess M. The suit was disposed off on such undertaking by Saini. Saini's son thereafter filed a suit for partition in respect of two plots claiming that he had a share in the said properties, forcing M to file a contempt application before the High Court, alleging violation of the undertaking of Saini to the Civil Court. The High Court of Delhi, without issuing notice to Saini, granted liberty to M to approach the Civil Courts.

37. An application under Order 39 Rule 2A of the CPC read with Sections 10, 11 and 12 of the Contempt of Courts Act, 1971 was filed by M against Saini, his wife and two sons. This was contested by Saini. The Civil Court held that Saini had taken inconsistent pleas and had violated the undertaking, making out a *prima facie* case of contempt and referred the matter to the High Court to be dealt under the



provisions of 1971 Act. In the meantime, Saini had also filed a suit for cancellation of the sale deed.

38. Before the High Court in the criminal complaint, referred to above, it was argued on behalf of Saini that it was only a case of civil contempt which could have been dealt with by the Trial Court only and by no means could be treated as a criminal contempt case. It was urged that the High Court erred in treating the same as criminal contempt and awarded punishment to Saini which was not warranted under the facts and circumstances of the case.

39. The Supreme Court, on a consideration of the issues, held that any application under Order 39 Rule 2A of the CPC would lie only where disobedience/breach of an injunction granted had taken place and that also during the pendency of the suit. In case, there was any grievance of non-compliance with the terms of the decree passed in the civil suit, the remedy available to the aggrieved person was to



approach the execution Court under Order 21 Rule 32 of the CPC.

40. Applying the principle of *sublato fundamento cadit opus*, which means foundation being removed, structure falls, the Supreme Court held that the application under Order 39 Rule 2A of the CPC itself was not maintainable and, therefore, all subsequent proceedings became inconsequential. The order passed by the Delhi High Court convicting Saini in contempt was set aside.

41. In the aforementioned contexts, viz., in **Pandurang** (supra) where a criminal appeal carrying sentence of more than two years was necessarily to be heard by a Division Bench and not by a Single Judge in accordance with Bombay High Court Appellate Side Rules and in **Kanwar Singh Saini** (supra) where the initiation of criminal contempt was flawed, the Supreme Court had emphasized the importance of adherence to the prescribed procedure and rules of practice.



42. It must not be lost sight of that a rule laying down the powers of a Single Judge is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases by a particular number of Judges. If the rule says that a case of a type has to be heard by a Division Bench, it cannot be heard by a Single Judge; but if a case which is to be heard by a Single Judge, is finally heard and disposed off by a Division Bench, no party can complain of usurpation or creation of a jurisdiction not vested with the Division Bench.

43. Though the reference to the judgments of the Supreme Court in the case of **Pradhani Jani vs. State of Odisha (2024) 4 SCC 451** and **Kusha Duruka vs. State of Odisha (2024) 1 SCR 604** may not be very apt but are worth taking note of for the reason why all the appeals arising out of the same judgment and order of conviction were directed to be listed together before a Division Bench.



44. In **Pradhani Jani** (supra), the Supreme Court found that the practice of applications arising out of the same FIR being placed before different Judges had led to anomalous situation where certain accused persons were granted bail whereas some with similar role were refused bail. It was thus directed that the High Court concerned would consider passing appropriate orders so that contrary orders in the same crime are avoided.

45. In **Kusha Duruka** (supra) also, the underlying concern was that cases arising out of the same FIR ought to be placed before one Judge for the purpose of avoidance of contradictory orders. However, in **Kusha Duruka** (supra), the main issue was with respect to the course of action to be taken if a party approaching the Court did not disclose correct material facts including the rejection of prayers of some of the accused persons by different Benches.

46. Since Section 307 of the IPC carries a



maximum punishment of life imprisonment, a Government Appeal under Section 377 of the Cr.P.C. for enhancement of sentence would, according to the rules, be listed before a Division Bench.

47. So is the case with an appeal under Section 372 of the Cr.P.C. by a victim for adequate compensation.

48. If the two appeals were slated to be listed before the Division Bench, it was in the fitness of things that the other three Cr. Appeals (SJ) were directed to be listed before the Division Bench along with the aforementioned Government Appeal and the Appeal under Section 372 of the Cr.P.C.

49. This does not create any jurisdiction in favour of a Division Bench with respect to hearing of an appeal against a sentence of ten years.

50. Any decision by a larger Bench than the minimum prescribed would not be a violation of any rule as the list of cases which could be disposed off by a



Division Bench, does not necessarily exclude the listing and disposal of a criminal appeal with a sentence only up to ten years.

51. As we have already noted, the converse of the situation would not be permissible i.e. an appeal with more than ten years sentence cannot be heard by a Single Judge.

52. This has also been the consistent practice of this Court.

53. A hypothetical situation could be assumed when in a Single Judge appeal, the prayer for suspension of sentence is allowed and in the Government Appeal seeking enhancement of sentence, the Division Bench agrees to and decides in favour of the prosecution, thereby directing for enhancement of sentence of such appellant.

54. In order to avoid such a situation, the rule of practice of this Court is that if in several appeals arising out of one Trial Court judgment, where some, on



account of the specific sentence imposed upon the specific appellant, is to be listed before a Division Bench, the other appeals with a sentence up to ten years also be listed along with those appeals before the Division Bench.

55. We answer the reference, thus, that in case some of the criminal appeals arising out of the same Trial Court judgment, carrying a sentence of more than ten years or a Government Appeal for enhancement of sentence or an appeal under Section 372 of the Cr.P.C. by the victim is preferred before a Division Bench in accordance with the rules, the criminal appeals arising of the same judgment with lesser sentence i.e. up to ten years, would also be heard by the Division Bench.

56. This practice does not create any jurisdiction in the Division Bench in the matters to be exclusively heard and disposed off by a Single Judge.

57. It would only be appropriate that



necessary amendment in this regard is brought out in Patna High Court Rules regarding filing of appeals and allocating it before the Benches.

58. The reference is answered accordingly.

59. Let this judgment be placed before Hon'ble the Chief Justice for necessary consideration for carrying out corresponding amendment in the Patna High Court Rules.

(Ashutosh Kumar, J)

Jitendra Kumar, J : I agree

(Jitendra Kumar, J)

Alok Kumar Pandey, J : I agree

(Alok Kumar Pandey, J)

Sauravkrishna/
Rajesh

AFR/NAFR	AFR
CAV DATE	27.09.2024
Uploading Date	22.11.2024
Transmission Date	22.11.2024

